

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: CS/SB 890

SPONSOR: Education Committee and Senator Wise

SUBJECT: Student and Parent Rights

DATE: April 4, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hermanson</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Munroe</u>	<u>Wilson</u>	<u>HE</u>	<u>Favorable</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute gives K-12 students the right to carry an epinephrine auto-injector and self-administer epinephrine by auto-injector if the school is provided with parental and physician authorization. After the school has appropriate authorization, the student may carry and self-administer epinephrine from an auto-injector while in school, participating in school-sponsored activities, or in transit to or from school or school-sponsored activities.

The committee substitute also requires the State Board of Education (SBE), with the cooperation of the Department of Health (DOH), to adopt rules for student use of epinephrine auto-injectors, and these rules must include provisions to protect the safety of all students from the misuse or abuse of auto-injectors. Additionally, a school district, county health department, public-private partner, and their employees and volunteers are indemnified by the parent of a student authorized to carry an auto-injector for any and all liability with respect to the student's use of an epinephrine auto-injector.

The committee substitute amends s. 1002.20, F.S.

II. Present Situation:

Epinephrine

Epinephrine is used to treat anaphylaxis—a severe and potentially life-threatening allergic reaction to a variety of allergens including insect venom, food, medication and latex. While people who are prone to anaphylaxis try to avoid contact with the culpable allergens, accidental food ingestion and insect stings can still occur. In the event of a severe allergic reaction, immediate treatment is necessary, and epinephrine is one of the first drugs given to a patient experiencing anaphylaxis. Given the need for immediate treatment, many people who are prone to anaphylactic reactions carry a prescription epinephrine injection kit, such as EpiPen, to

administer to themselves in case they have a severe allergic reaction.¹ Epinephrine is usually administered by injection into the thigh with an automatic injection device, and emergency medical services should be called immediately after injection.²

At least eighteen states allow students who are prescribed epinephrine auto-injectors to carry and self-administer them if necessary.³ Last year, Congress passed the Asthmatic School-Children's Treatment and Health Management Act of 2004, which gives grant preference to any state that authorizes students to self-administer medication to treat asthma and anaphylaxis. Under the federal law, the student must have a prescription for the medication and have been instructed on how to use that medication.⁴ The federal law also requires the health care practitioner to formulate a written treatment plan for managing asthma or anaphylaxis episodes of the student and for medication use by the student during school hours.⁵

Currently, Florida students do not have a statutory right to carry epinephrine auto-injectors. However, s. 1002.20(3)(h), F.S., allows asthmatic students, upon approval from their parent and physician, to carry inhalers while in school. Even though there is not a statute allowing students to carry epinephrine auto-injectors, a few school districts currently have their own policies that allow students to self-medicate with epinephrine auto-injectors. These districts require medical and parental authorization, and judgments are made on the responsibility level of each student. Other school districts require epinephrine auto-injectors to be stored in a specific location.⁶ Once epinephrine has been administered, the school health staff or the person designated to administer medication should call 911 for emergency medical services.⁷

At present, Palm Beach County School District is the only district known to have a school nurse at every school.⁸ Despite the fact that not every school has a nurse, s. 1006.062, F.S., allows school district nonmedical personnel to perform health-related services, including administering injectable medication, upon successful completion of child-specific training by certain medical practitioners, subject to periodic monitoring by a nurse.

While current Florida law does not specifically address student epinephrine use, it does provide guidelines for administering prescription medications. Under s. 1006.062, F.S., district school board personnel, including school nurses, may assist students in the administration of prescription medication under certain conditions. First, each school district must have a procedure to provide training by certain registered or licensed medical practitioners to the district school board personnel who have been designated to assist students in the administration of prescribed medication. Second, each district school board must adopt policies and procedures governing the administration of prescription medications by district school board personnel. The policy must require that the student's parent provide a written statement granting the school principal or the principal's designee permission to assist in the administration of such medication

¹ Source: From PDR Health, available at: <http://www.pdrhealth.com/content/rx_drugs/chapters/fgrx14.shtml>.

² Source: DOH SB 890 analysis.

³ See PL 108-377 (2004).

⁴ See PL 108-377 (2004).

⁵ See PL 108-377 (2004).

⁶ Source: DOE personnel, March 18, 2005.

⁷ Source: DOH SB 890 analysis (February 3, 2005).

⁸ Source: DOE personnel, March 18, 2005.

and explaining the necessity for the medication to be administered during the school day. After receiving the training, the school principal or the principal's trained designee assists the student in administering the medication. In addition, the school must receive, count and store all student medications in their original containers, and those containers must be stored in a secure location.

Additionally, under s. 1006.062, F.S., if the school district employee administering the medication acts as a reasonably prudent person would have acted in the same or similar situation, the district school board is not liable for civil damages.

Sovereign Immunity

Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions. As used in s. 768.28, F.S., "state agencies or subdivisions" include the executive departments; the Legislature; the judicial branch, including public defenders; and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority. Section 768.28(5), F.S., imposes a \$100,000 limit on the government's liability to a single person and for claims arising out of a single incident, the limit is \$200,000. Section 768.28, F.S., outlines requirements for claimants alleging an injury by the state or its agencies. Section 11.066, F.S., requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to enforce a judgment against the state or state agency. The exclusive remedy to enforce damage awards that exceed the recovery cap is by an act of the Legislature through the claims bill process. A claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

The second form of sovereign immunity potentially available to private entities under contract with the government is set forth in s. 768.28(9), F.S. It states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent's torts. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.⁹ The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.¹⁰

Section 768.28(9), F.S., defines "officer, employee, or agent" to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S. (the Access to Health Care Act), any member of the Florida Health Services Corps, as defined in s. 381.0302,

⁹ *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

¹⁰ *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

F.S., who provides uncompensated care to medically indigent persons referred by DOH, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.

III. Effect of Proposed Changes:

The committee substitute amends s. 1002.20, F.S., to give a student who is at risk of experiencing life-threatening allergic reactions the right to carry an epinephrine auto-injector and self-administer epinephrine by auto-injector while in school, participating in school-sponsored activities, or in transit to or from school or school-sponsored activities. In order for a student to carry an epinephrine auto-injector, the school must be given both parental and physician authorization.

By allowing students who are at risk of a severe allergic reaction to carry epinephrine auto-injectors, valuable time may be saved in the event of a reaction. Additionally, the requirement of parental and physician approval should ensure that only students who need to carry epinephrine auto-injectors do so.

The committee substitute also requires the SBE, with the cooperation of DOH, to adopt rules for the use of epinephrine auto-injectors. Those rules must include provisions to protect the safety of all students from the misuse or abuse of auto-injectors.

Since students may have to self-inject at a location away from medically-trained school staff, there may be a need to train all school personnel on auto-injector safety procedures. This concern, as well as any others, can be addressed in the SBE rules for student use of epinephrine.¹¹

The committee substitute also requires the parent of a student authorized to carry an auto-injector to indemnify the school district, county health department, public-private partner, and their employees and volunteers for any and all liability with respect to the student's use of an epinephrine auto-injector pursuant to this act.

This committee substitute will take effect January 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

¹¹ Source: DOH SB 890 analysis (February 3, 2005).

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. **Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

District school boards may be spared litigation and lawsuits that could result, as they have in other states, from tragic results of a student not having an auto-injector at the on-set of a severe allergic reaction. Conversely, school districts may be subject to litigation occurring from improper use of epinephrine auto-injectors.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

The indemnity provision does not prohibit a person from filing suit against a school district, county health department, public-private partner, and their employees or volunteers if an epinephrine auto-injector is used in a manner that results in injuries to the student or a third party. Some of the aforementioned parties may be covered by sovereign immunity and the amount of recovery would then be limited by s. 768.28, F.S. Moreover, the bill does not prevent a putative plaintiff in such a suit from executing judgment against the above-mentioned parties. Instead, the indemnity provision merely provides that the aforementioned parties may recover from the parent of the student authorized to carry the auto-injector. As a practical matter, many parents may not have sufficient recoverable assets from which a school district, county health department, public-private provider, or their employees or volunteers could execute a judgment.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
